# No. 16206

IN THE

# United States Court of Appeals

For the Ninth Circuit

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BLUE MOUNTAIN CONSTRUCTION COMPANY, a corporation,
*Appellant,*
vs.
H. C. WERNER and TAUF CHARNESKI,
*Appellees.*

No. 16206

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## PETITION FOR REHEARING ADDRESSED TO CIRCUIT JUDGES ORR, HEALY AND FEE

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*Appeal from the United States District Court for the District of Oregon*

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*Attorneys for Appellant*

NATIONAL PRINTING CO. 74644

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Appellant respectfully petitions the Honorable Judges who constituted the Court on the original hearing of this appeal that a rehearing, preferably en banc, be granted in this matter.

The opinion filed August 19, 1959 affirming the judgment of the District Court, was by a divided Court, with Judges Orr and Fee for affirmance and Judge Healy of the opinion that the District Court judgment should be reversed. Naturally we espouse the dissenting opinion of Judge Healy, but we do earnestly feel and submit that the reasons advanced in the majority opinion of Judge Orr, on which the affirmance is based, merit reconsideration.

The conclusion reached by Judge Orr appears to be based on the fact, and it is a fact, that appellant in support of its motion for a voluntary dismissal without prejudice, made no showing that the appellees were insolvent, the opinion stating at page 3,

> "However, it nowhere appears that it was necessary to sue the sureties, no showing being made that the appellees are insolvent."

and the opinion goes on to say,

> "As against this lack of showing on the part of appellant, the trial court was justified in turning to the other side of the coin."

We earnestly submit to the Court that the solvency or insolvency of the individual defendants should not be a determining factor in this matter. The paramount reason for this is that defendants, and particularly defendants who are individual persons as distinguished from established corporations, may well be entirely solvent when litigation is commenced and

thoroughly insolvent and judgment proof when the litigation has eventually been reduced to judgment. As this case was postured before the District Court of Oregon, there was no way under the law to insure that these defendants, though they may have been solvent at the time the action was commenced, would be solvent at its termination, so as to respond to a judgment. Individual defendants such as these may or may not be insolvent, and there is no practical way for a stranger to their affairs, such as appellant here, to determine this so as to know whether it is necessary to sue the sureties, and likewise no way to obtain information on which to base a claim or showing of insolvency.

The very purpose of the Miller Act in requiring a surety bond to protect appellant, if it has the rights it claims to have under the Miller Act, is to remove this uncertainty of payment as to those who furnish labor and materials in the performance of government contracts. The Miller Act provides for a bond to protect suppliers for the very reason that one may furnish labor and materials to another who is then solvent and able to pay but who at a later time, by reason of the uncertainties of business life, may become insolvent.

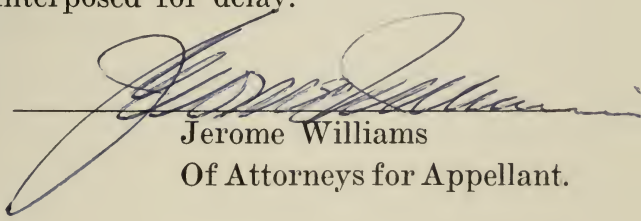
This premise on which the majority opinion has been based was nowhere discussed in either of appellant's briefs nor in appellees' brief and, to the best of our recollection, was likewise not discussed on the oral arguments at the original hearing. We earnestly submit that there should be a rehearing for this reason alone.

Furthermore, this case is unusual in that the result reached by the majority might represent the loss to appellant of most substantial rights without the processes of the law having afforded appellant its full day in court by way of a hearing on the merits. Litigation does not often take such a turn in present-day practice, and we suggest that a dismissal with prejudice without a hearing on the merits of substantial litigation such as this is a matter that well deserves the attention of the full Court by way of a rehearing en banc, especially where the three judges who originally heard this appeal had divergent views.

Respectfully submitted,

JEROME WILLIAMS
CASHATT & WILLIAMS
*Attorneys for Appellant.*

The undersigned, one of counsel for the appellant herein, certifies to the Court that in his judgment the within petition for rehearing is well founded and that it is not interposed for delay.



Jerome Williams
Of Attorneys for Appellant.